No. 950

In the

Supreme Court of the United States

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PETITIONERS' REPLY TO RESPONSES TO PETITION FOR WRITS OF CERTIORARI

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LOCAL UNION 984, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., *et al.*,

Petitioners,

v.

THE HUMKO COMPANY, INC. (A Division of National Dairy Products Corporation), RALPH KENT PHILLIPY, and KUHNE-SIMMONS COMPANY, INC., *et al.*,

Respondents.

PETITIONERS' REPLY TO RESPONSES TO PETITION FOR WRITS OF CERTIORARI

Petitioners file this reply to the Responses to Petition for Certiorari primarily because of the question which the recent *General Electric* case now poses. *Local 761, Electrical Workers v. N.L.R.B.*, U. S. , 5 L. Ed. 2d , 81 S. Ct. , decided May 29 of the current term.

Neither of the Responses filed herein refers to that decision, although the holding in that case directly affects the question posed by the instant case. Petitioners file this reply for the further reason that they desire to note several glaring misstatements contained in the Responses.

I. Effect of the Reserved Gate Doctrine

This Honorable Court held in the *General Electric* case that the controlling consideration in determining the illegality of picketing at a gate reserved for neutral employees at an employer's primary premise was:

> "* * * the work done by the men who use the gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations."

In *General Electric* there was no question that the normal operations of the employer consisted of producing appliances, but did not include construction of plant improvements. In the instant case, however, the normal operations of the employer included providing architectural and engineering services in connection with the building of its own additional plant and also the hiring and training of new employees who would ultimately become production employees at the new plant. These "normal operations" were in addition to the operation of producing edible fats such as shortening, cooking oil and margarine. The question is presented: Does a union have the same right to picket at a second (but not necessarily secondary) site occupied by an employer when the employer is engaged in normal but different operations from those engaged in at the site where its employees are on strike?

Such picketing in the instant case was necessitated by the facts of life in modern corporate industry. The employees of one plant (at Memphis) of National Dairy Products Corporation were on strike. That plant normally produced edible oils and was operated by one division of the employer called

"Humko". For the strike to be evenly slightly effective against such a giant corporation the union needed to appeal to employees working at and being hired at another location where the employer was building a new plant to produce exactly the same product as the struck plant. The imminent distribution of Humko oils from the new plant could only diminish the effect caused by loss of production at the struck plant.

A material fact ignored by the courts below and also by the Responses filed herein was that National Dairy Products Corporation, Kraft Engineering Division and Humko Company were all one and the same employer within the meaning of both the common law and the labor law. Notwithstanding the differences in names, all employees of National Dairy, Kraft Engineering and Humko at the Champaign site were employees of the same corporation, which corporation was the primary employer engaged in a dispute with petitioner local union. Petitioners contend that the local union had a right to appeal to all persons approaching the Champaign site in exactly the same manner as it appealed to persons approaching the Memphis site where the striking employees normally worked. In view of the *General Electric* decision, petitioners, of course, concede that the union could not have lawfully picketed a reserved gate located at the Champaign site if such gate had been restricted to employees of Kuhne-Simmons Co., Inc., Ralph Kent Phillipy and other contractors performing construction work. However, it is undisputed that access to the Champaign plant site was available through only a single gate with the exception of a railroad gate used exclusively by the railroad. No picketing occurred at the railroad gate. The picketing which occurred at the common gate,

used by employees of the primary employer as well as employees of the contractors, clearly met all of the *Moore Dry-dock*[1] standards:

(1) The situs of dispute was located on the Champaign premises for the reason that the employer was actively engaged in hiring production employees at an office located at the site, which employees were being sent to Memphis to work behind the picket line at the struck plant while in training for reassignment to later production work in Champaign. Also, truck drivers from the bargaining unit of the Memphis plant regularly hauled material from the Memphis plant to the Champaign plant.

(2) Primary employer was engaged in its normal business and it was its normal business to construct its own plants, providing architectural and engineering services through its own engineering department. It was also hiring and training and performing other duties. Employer's attorney admitted that at the time of the picketing the employer in Champaign was engaged in its "normal business activities * * * to build that plant and hire and train employees at that plant site, and take them to Memphis for further training, and further to send them back to Champaign for actual duties on the job." He called these "preliminary activities in terms of personnel, which was very much their *normal business activity*" (91a-92a, emphasis added).

(3) The picketing took place immediately at the gate, as close as possible to the office where the primary employer was engaged in these activities.

[1] Sailors' Union of the Pacific (Moore Dry Dock), 92 N.L.R.B. 547.

(4) The picketing clearly disclosed that the dispute was only with the primary employer, for the picket sign was specifically limited to the Humko Company, and the site bore a large sign indicating that it was the plant of the Humko Company.

Certiorari should be granted in this case in order to clarify the rights of a union to picket a large employer engaged in activity at widely separated locations. Surely it is not the law that a large employer may immunize itself from picketing by virtue of its plants being scattered. A large corporation will draw upon its full economic resources to sustain a strike. Conversely, a union has the right to picket such an employer at any location where it is engaged in its normal operations. Thus, the fact that the Champaign, Illinois Plant, which was designed to produce the same product as the struck plant, was 400 miles away should be of no material significance. Likewise, it should not be material to this case that substantial numbers of individual employees of contractors refused to cross the picket line at the primary employer's premises. There was no gate reserved for these employees. Therefore, the right to picket generally the one common gate at those premises should not have been proscribed.

The extent to which primary employer, National Dairy-Humko, was actually engaged in normal operations at the Champaign site while the picketing was in progress is even indicated by the damage award to Humko. Such award included $4,139.12 representing earnings of Humko employees

in Champaign and $6,078.50 representing wages and salaries to Kraft Engineering employees in Champaign. There was an additional item of $10,214.16 representing the wages of trainees at the Memphis Plant, many of whom were hired in Champaign at the office located on the job site, all of whom were destined for production jobs at the Champaign plant. At the exact time of the picketing there were 16 National Dairy-Humko employees working at the Champaign site. The number of employees of the primary employer using the common gate was thus certainly not *de minimus*.

In light of the reserved gate decision, the foregoing questions require clarification. This is especially so in comparing the rule of law expressed by the Eighth Circuit in *Local 618 Automotive etc. Union v. NLRB (Site Oil), 249 F. 2d 332.*

In that case picketing was directed to the employees of a neutral contractor at a remote site occupied by the primary employer when the primary employer had no employees on the job. But such picketing was treated by the Court of Appeals as primary picketing and thus not within the proscription of Section 8(b)(4)(A). Ir view of the heavy damage penalties contained in Section 303 of the Act, labor unions will incur great risk and possible bankruptcy unless guidelines are spelled out regarding picketing of a primary employer at a location removed from the actual place of the labor dispute, although such employer is engaged in its normal operations.

II. Misstatements in Responses

1. The Humko Response (p. 2) alleges that the plant under construction was "in charge of the contractors". It is undisputed that the opposite was true. It was in charge of the Kraft and Humko engineers (193a) and Humko maintained the insurance on the property and contracted for and paid for the Pinkerton Guard Service (523a, 548a, 550a).

2. Both the Humko Response and the Kuhne-Simmons Response allege that a National or International representative of International Teamsters Union came to the Champaign site and told the pickets "to keep on that gate and keep walking". The record is to the contrary, for on cross-examination the witness who allegedly heard this man talking to a picket stated that he did not know what international union the man was referring to and that it could have been "any international union" Respondent Humko is patently misquoting the record, using such evidence as proof that "a national representative of *International* Teamsters Union came to the construction job at Champaign". (Emphasis added.) (p. 9 of Humko Response, 118a).

3. Likewise the record is misquoted as to the allegation that the local business agent said that he had "100% backing by International Union" (p. 10-Humko Response). The witness who so testified stated that he was not sure whether the business agent was referring to financial backing or

another type of backing, but that the backing was "for the benefit of the men that was out on strike * * * *here in Memphis*". (Emphasis added, 140a.) The "backing" was not related to the Champaign picketing. But even more significant, he testified that he did not know whether the business agent was successful in getting that backing (142a).

4. The Humko Response further misquotes the record in stating that International Representative Murtha "discussed the Champaign matter" prior to the strike (p. 10). A reference to the cited page in the record (453a) shows just the opposite—that the witness denied any such discussion and there was no other evidence of such a discussion.

The foregoing attempts to infer a factual basis for responsibility of the International Union represent a distortion of the record. Petitioners do not seek certiorari here based upon disputed issues of fact, for the record is clear that the International Union was held liable solely on the basis of its affiliation with the local as contained in the union constitution, and on the basis that an International Representative, at the request of the employer, assisted in some of the negotiations for a collective bargaining contract. The International Representative, however, had no prior knowledge—and the record is undisputed on this point—of the Champaign picketing.

CONCLUSION

Petitioners respectfully pray that writs of certiorari be granted for reasons set out hereinabove and in its original petition.

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